LEONA R. STRANG

IBLA 76-153 Decided August 2, 1976

Appeal from decision of the Townsite Trustee, Bureau of Land Management, Anchorage, Alaska, rejecting application for a trustee deed.

Set aside; hearing ordered.

1. Alaska: Townsites -- Regulations: Applicability

   To the extent that the provisions of the nonnative townsite law do not vitiate the purposes of provisions of the Alaska native townsite law, the provisions of the nonnative townsite law are to be applied in the disposition of native townsite lands.

2. Alaska: Townsites

   The person or persons who may be awarded a deed to a lot in a townsite are those individuals who occupied or who were entitled to occupancy of such lot on the date of final subdivisional survey.

3. Alaska: Townsites -- Rules of Practice: Hearings

   Where there are conflicting claimants to lots in a native townsite and the record does not clearly reflect who occupied or who was entitled to occupancy of the lots on the date of final subdivisional survey, the Board may, on its own motion, order a hearing.

APPEARANCES: John L. Sund, Esq., Ellis & Sund, Inc., Ketchikan, Alaska, for appellant. Victor M. and Patricia M. Ward, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

On August 5, 1975, George E. M. Gustafson, Townsite Trustee, Bureau of Land Management, Anchorage, Alaska, issued a decision rejecting the application of Leona R. Strang filed October 23, 1973, for an unrestricted deed to Lots 3 and 4, Block 1, United States Survey 3851, Addition to Townsite of Kake, Alaska. 1/

The decision held that Mrs. Strang never placed improvements on either lot and that she had not diligently pursued her development of the lots. The Trustee stated that an unrestricted deed to Lots 3 and 4 would be issued to Victor M. and Patricia M. Ward as soon as they placed a house on the lots. The Wards filed an application for Lots 3 and 4 on March 4, 1974. 2/

Mrs. Strang appeals the Trustee's decision. Review of the record reveals that Mrs. Strang notified the Trustee by letter dated January 6, 1970, that she wished to claim the two lots within the Kake Townsite. By letter dated January 14, 1970, the Trustee informed Mrs. Strang that she could proceed to put her improvements on the lots and "[a]fter you have improved the lots you may apply to this office for a deed."

In an affidavit accompanying her statement of reasons for appeal, appellant swears that she and her family began clearing the lots in March 1970; that she hired one Bill Short to clear the land in April and June 1970; that in June 1970 she and her family moved a 10' x 50' trailer house onto the property, connected sewage and water lines to the trailer and installed a septic tank on

1/ Kake Townsite was established by Executive Order 4712, dated August 30, 1927, which reserved approximately 94 acres of land from the Tongass National Forest "to be disposed of for townsite purposes as provided by Sec. 11 of the act of March 3, 1891 (26 Stat., 1095), and the act of May 25, 1926 (44 Stat., 629)."

2/ We note that on the Ward application, under the section entitled "Statement of Two Disinterested Witnesses," the following appears:

"We Marvin [?] Grant Jr. and Clarence Jackson hereby certify that we have read the above statements made by the applicant and from personal knowledge know that the statements made are true to the best of our knowledge and belief and are made in good faith." However, although the signatures of Grant and Jackson should have appeared thereunder, the signatures affixed are those of Frank Gordon and Marvin Kadake.

the property; and that she and her family resided in the trailer house until November 1970 when lack of employment forced them to move to Petersburg, Alaska.

On October 23, 1973, appellant filed an application seeking a deed to the lots. She was informed by the Trustee by letter dated October 26, 1973, that her application had been mailed to the Bureau of Indian Affairs for certification; that it was his belief that there were no conflicting claimants; and that following the BIA certification and prior to the issuance of a deed he would have to visit Kake and determine the extent and location of the improvements. The BIA certification was received by the Trustee on November 24, 1973.

In the August 5, 1975, decision, the Trustee explained the basis for his holding as follows:

> An examination of the lots by the Trustee on April 8, 1970 revealed there had been no improvements made on the lots. There was a house trailer located on Keku Road right-of-way in front of Lot 3. There was no evidence of clearing on either Lot 3 or Lot 4 for a building site. Subsequent visits to Kake by the Trustee revealed that the trailer had been removed from the road right-of-way and there was no activity on the lots.
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> The most recent field trip by the Trustee to Kake was made on June 10 and 11, 1975. A re-examination of Lots 3 and 4 revealed that there has been extensive bulldozer work and a lot of gravel fill put on the lots preparatory to building. Also on the lots were a dozen creosoted pilings varying in length from 6' to 10'. Victor and Patricia Ward informed the Trustee they were preparing the site for a modular house.
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> In a letter received June 16, 1975 (copy attached) the Hon. Frank Gordon, Mayor of Kake, verified the fact the trailer had been parked on the road right-of-way, and any work done on Lots 3 and 4 was for the construction of a water line for the city. In view of the fact that in a letter received on June 19, 1975 (Copy attached) Bill D. Short who on July 19, 1974 had written (Copy attached) he had cleared land with a D-4 catapillar [sic] for Mrs. Strang, wrote that the trailer was placed just off the road. It was not on the area claimed by Victor Ward.

> Mrs. Leona R. Strang never had placed improvements on Lot 3 or Lot 4, and the fact that she had in a period of four years from 1971 to 1975 had [sic] not diligently pursued her development of the lots her application for an unrestricted deed to Lots 3 and 4, Block 1, U.S. Survey 3851 is hereby rejected.

The Act of May 25, 1926, 44 Stat. 629, 43 U.S.C. § 733 et seq. (1970), provides for the townsite survey and disposition of the public lands set apart or reserved for the benefit of Indian or Eskimo occupants in trustee townsites in Alaska. The Act of February 26, 1948, 62 Stat. 35, 43 U.S.C. § 737 (1970), provides for the issuance of an unrestricted deed to any competent Native for a tract of land claimed and occupied by him within any such trustee townsite. The regulations issued pursuant to such statutes are contained in 43 CFR Subpart 2564.

An examination of the regulations indicates that in order to qualify for an unrestricted deed one must file an application. The applicant must be an Alaskan Native. He must be certified by the Bureau of Indian Affairs as being competent to manage his own affairs. And he must claim and occupy a tract of land in a townsite or be the owner of land under a restricted deed issued under the Act of May 25, 1926, supra. 43 CFR 2564.6 and 43 CFR 2564.7. 3/

3/ 43 CFR 2564.6 reads as follows:

"Any Alaska native who claims and occupies a tract of land in a trustee town site and is the owner of land under a restricted deed under the act of May 25, 1926 * * * may file an application for an unrestricted deed pursuant to the act of February 26, 1948 * * * with the town-site trustee. The application must be in writing and must contain a description of the land claimed and information regarding the competency of the applicant. It must also contain evidence substantiating the claim and occupancy of the applicant, except when the applicant has been issued a restricted deed for the land. * * *" (Emphasis added.)

The requirement that an Alaskan Native must claim and occupy land and be the owner of such land under a restricted deed in order to apply for an unrestricted deed is clearly erroneous when read with the remainder of the regulation. The statement that the application must contain evidence substantiating the claim and occupancy, except when the applicant is the holder of a restricted deed, only makes sense if the above are read to be alternative requirements. A Native must claim and occupy the land or be the owner under a restricted deed. The application must then contain evidence of the claim and occupancy only if the Native is not already the owner under a restricted deed.

[1] Under the regulations governing native townsites there are no specific sections dealing with disposal of additional lots within a native townsite. In such a circumstance, the provisions of the nonnative Alaska townsite law, to the extent they do not vitiate the purposes or provisions of the Alaska native townsite law, may be applied in the disposition of native townsite lands. City of Klawock v. Andrew, 24 IBLA 85, 90 (1976). As in City of Klawock, the particular regulation of interest herein is 43 CFR 2565.3(c), which provides in pertinent part:

> * * * Only those who were occupants of lots or entitled to such occupancy at the date of approval of final subdivisional town site survey or their assigns thereafter, are entitled to the allotments herein provided. * * *

[2] The date of approval of final subdivisional survey for the lots in question in the present case was January 2, 1975. Therefore, we find that the person or persons who may be awarded an unrestricted deed to lots 3 and 4 are those individuals who occupied the lots on January 2, 1975, or who were entitled to occupancy on such date.

A review of the record points up a number of discrepancies in this case. The Trustee stated in his decision that he visited the lots on April 8, 1970, and found no improvements or evidence of clearing on the lots, although there was a house trailer on the Keku Road right-of-way in front of lot 3. Appellant states that clearing of the lots began in March 1970, but that their trailer was not placed on the property until June 1970, at which time water and sewer lines were connected to the trailer and a septic tank installed on the property. The Trustee indicated that subsequent visits to the site were made at which time there was no activity on the site and the trailer had been removed from the right-of-way. The Trustee failed to give the dates of such visits.

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fn. 3 (continued)
In reviewing the history of the regulation the error becomes apparent. In January 1964 the regulation (then 43 CFR 80.26) contained the disjunctive "or." In April 1964 when the numerical designation of the regulation was changed and the regulation became 43 CFR 2242.9-3(i), "or" was dropped and the regulation read:

"Any Alaska native who claims and occupies a tract of land in a trustee townsite is the owner of land under a restricted deed * * * may file an application * * *."

The error went undetected until 1975 at which time an "and" was inserted in an attempt at clarification. The attempt was less than adequate. It is clear that the original "or" should have been inserted rather than "and" inserted to give the regulation meaning.

The Trustee stated that he made a field trip to the site on June 10 and 11, 1975, and found extensive bulldozer work done on the lots. Gravel fill had been spread and there were about a dozen creosoted logs on the site. The Trustee was informed by the Wards that they were preparing the site for their modular home.

The letter from the Mayor of Kake, Frank Gordon, to the Trustee, dated June 12, 1975, stated that to Mr. Gordon's knowledge and based on his observations, Mrs. Strang never made improvements on the lots and that any clearing in the area was probably done in conjunction with the building of a road to a water storage area. He did not believe that Mrs. Strang had a valid claim to the two lots. He suggested that his statements concerning the clearing in the area could be substantiated by one Jerry Sargent, an employee with the Alaska Department of Environmental Conservation. There is no record in the case file of any attempt made by the Trustee to contact Mr. Sargent.

Mrs. Strang alleges that on or about September 23, 1970, she had a house warming in her trailer on the lots and that Frank Gordon, who was at that time a councilman in Kake, attended.

Bill Short, who allegedly did the original clearing of the land for appellant in 1970 informed the Trustee by letter dated June 16, 1975, that he did not believe the area where the Strang trailer was located was the same area claimed by the Wards. He recalled that the Strang trailer was "just off the road," while the lots claimed by the Wards were "upland lots."

In her affidavit appellant refers to two attached pictures which she swears were taken on August 16, 1975. She stated that the pictures show the approximate area where her trailer was located and that the land is substantially the same as when she was there in 1970, the only apparent difference being the movement of some soil by a tractor. Lying in the foreground of the pictures are a number of creosoted logs.

Appellant requests that the Trustee's decision be reversed and that an unrestricted deed to the lots be issued to her.

From the present record it is impossible to determine who occupied or who was entitled to occupancy of the lots in question on January 2, 1975.

There are essential facts in dispute. It appears that appellant clearly was not occupying the land on January 2, 1975; however, the question arises whether the allegations of use and occupancy made by appellant would, if proven, establish that she was entitled to occupancy of the lots on January 2, 1975. 4/

[3] We need not decide whether due process requires that appellant have an opportunity to present evidence concerning her occupancy of the lots. See Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), rev'g Pence v. Morton, 391 F. Supp. 1021 (D. Alaska 1975). While neither appellant nor the Wards have requested a hearing, it is within the province of this Board to order a hearing. As stated in 43 CFR 4.415:

> * * * The Board may, on its own motion, refer any case to an administrative law judge for a hearing on an issue of fact. * * *

Herein, appellant is claiming a right to lots 3 and 4. Her claim is in conflict with that of the Wards. Under the circumstances, we are referring this case to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an Administrative Law Judge.

The issue before the Judge will be: what party or parties, if any, occupied or were entitled to occupy the lots in question on the date of final subdivisional survey, January 2, 1975. 5/ Appellant should be allowed to present evidence concerning the nature of her claimed occupancy of the land and, if the Judge finds that she did, in fact, maintain improvements on the land, he must determine whether such occupancy established an entitlement to occupancy as of the date of final subdivisional survey. Following the hearing, the Judge will submit his proposed findings of fact and a recommended decision to this Board. 43 CFR 4.439.

4/ The following appeared in City of Klawock v. Andrew, supra at 95:

"In Sawyer v. Van Hook, 1 Alas. 108 (1900), the Court, in resolving conflicting claims to the same townsite lot, recited that the prior and superior claim to a townsite lot is established by settlement and improvement, or the initiation of such settlement. It held that residence need not be established, but that the clear and unmistakable intention to possess and improve must be evidenced on the ground. The Court found that the plaintiff's staking and depositing building materials on the lot at the time of determination established his right to the lot."

5/ If it is established that appellant had initiated settlement on the land prior to January 2, 1975, such a settlement could be lost through abandonment.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case referred to the Hearings Division.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Anne Poindexter Lewis
Administrative Judge